CR.RA/883/2004 1/13 JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 883 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHIKHABHAI PRAGJIBHAI PARAJAPATI - Applicant(s)

Versus

STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :

MR BHARAT T RAO for Petitioner No(s).: 1.
Mr. LR Pujari, Addl. PUBLIC PROSECUTOR for Respondent No(s).: 1.
MS VARSHA BRAHMBHATT for Respondent No(s).: 2.
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CORAM :HON'BLE MR.JUSTICE C.K.BUCH

Date : 13/07/2005

ORAL JUDGMENT

1. Heard ld. Counsel Mr. SM Sojitwala for ld. Counsel Mr. BT Rao for the petitioner, ld. APP Mr. Pujari for respondent No.1and ld. Counsel Ms. Varsha Brahmbhatt for respondent No.2 .

2. By filing the present Cri. Rev. Application, the petitioner -accused has assailed the legality and validity of the judgment and order of conviction dated 04.05.2004 recorded by ld. 3rd Jt. JMFC, Kalol in Criminal Case No. 2639/ 1995 and confirmed by the ld. Addl. Sessions Judge, 7th Fast Track Court, Mehsana vide judgment and order dated 20.12.2004 while disposing Criminal Appeal No. 31/2004 and Cri. Rev. Application No.97/2004(common judgment in both the proceedings), on various grounds as mentioned in the memo of the Cri. Rev. Application. The ld. Addl. Sessions Judge was dealing with the criminal appeal filed by the present petitioner as well as criminal revision application filed by the original complainant against the impugned order of ld. JMFC and pending the said proceedings, the substantive sentence imposed by the ld. JMFC was placed under suspension, but after hearing the parties, the ld. Addl. Sessions Judge dismissed the appeal and allowed criminal revision application and ordered the petitioner to pay compensation in exercise of powers vested in the Court under section 357 of CrPC and in view of the scheme of NI Act, of Rs. 88640/ i.e. the amount equal to the amount of cheque.

2A It is submitted that both the Courts below failed to

considered one important aspect that the cheque was not issued to satisfy the debt or legal liability. It is also argued that no statutory notice was served on the present petitioner and, therefore, there was no formal reply to the said notice. It is also argued that the ld. Trial Judge has erred in imposing penalty of Rs.5000/ and ld. Addl. Sessions Judge ought not to have awarded compensation of huge amount of more than Rs.80,000/.

3. Undisputedly, there are business transactions and certain material was purchased from the complainant and the petitioner had not paid the amount as per the say of the complainant. In view of the Scheme of Sec.138 of NI Act and in light of the oral evidence led by the complainant, version placed by the accused that the cheque could not have been given in the year 1995 because there were no transactions between the parties after 1991, is not believed. All the relevant aspects have been discussed at length by both the Courts below and it is found that the cheque was given in response to the genuine commercial transaction and the same was against the debt and legal liability. The judgment is based on positive findings based on material on record and there is no element of either perversity or illegality. It would be difficult for the Court to say that the ld. Trial Judge has failed in considering the documentary

evidence produced and the findings are misdirected. The same is the case with the ld. Addl. Sessions Judge. This is a case of two concurrent findings of fact and when it does not emerge from record that these findings are manifestly erroneous, the revisional court should not disturb those findings as per settled legal position.

4. It is submitted by ld. Counsel appearing for the petitioner that the appellate Court has no jurisdiction to award compensation under section 357 of CrPC. In support of this submissions, ld. Counsel has placed reliance on certain judgments discussed herein below;-

(i) Firstly, ld. Counsel appearing for the petitioner has placed reliance on the decision of the Apex Court in the case of **Hari Singh v/s Sukhbir Singh & Others, (1988)4 SCC 551.** On going through the said decision, this Court is of the view that the same would not be applicable in the present case because the Apex Court has simply observed that in appropriate cases, the order for compensation instead of deterrent sentence of imprisonment would be more justifiable. However, the same should be reasonable. In the said case, the accused was involved in the offence punishable under section 307 of IPC whereas this Court is presently dealing with the offence committed in a commercial transaction i.e. The offence punishable under section 138 of the Negotiable

Instruments Act.

(ii) The next decision relied upon is in the case of **K.Bhaskaran v/s Sankaran Vaidhyanbalan & Anr., (1999)7 SCC 510.** In the said decision, the Apex Court has discussed about the order of payment of compensation instead of fine. It is relevant to note that while dealing with the prosecution under section 138 of the Negotiable Instruments Act, the Appellate Court was not only concerned with the Scheme of sec.357 of CrPC only, but also is concerned with the intention of legislature when it introduced Chapter:XVII in the said Act. It is very much clear from the objects and reasons of the Amending Act of 1988. In the case of K.Bhaskaran (supra), the Apex Court has observed only that even trial Court can award compensation where the amount of cheque exceeds Rs.5000/. So, in the opinion of this Court, first appellate Court obviously can take care of the situation and adequate compensation is not awardable from the amount of fine imposed by the trial Court.

(iii) The next decision on which reliance is placed by ld. Counsel appearing for the petitioner is of the Apex Court in the case of **Arun Garg v/s State of Punjab & Anr., (2004)8 SCC 251.** While dealing with the case for the offences punishable under sections 498-A, 304-B of IPC, the Apex Court discussed the issue whether

compensation could be awarded where no fine for the offence was statutorily prescribed? In this decision, the Apex Court found that High court enhanced the amount of compensation without any discussion. More over, it was not said by the High court that the amount of fine is enhanced. So, the ratio of this decision does not put any embargo on the jurisdiction of the appellate Court to award compensation in a given fit case. In fact, in the present case, the ld. Appellate Judge has awarded compensation equal to the amount of cheque as discussed above which can not be said to be unreasonable or unjust.

(iv) In the same way, ratio of the decision of the Apex Court in the case of **State of Punjab v/s Gurubax Singh, (2002)6 SCC 663,** also would not help the present petitioner, because in the said decision, the Apex Court was dealing with the offence punishable under section 302 of IPC and in that background has observed that the question of award of compensation would not arise where the sentence imposed by the Court includes fine. Ratio propounded in the said decision is material different than the arguments advanced by ld. Counsel appearing for the petitioner. It would be beneficial to to quote relevant paras 9 & 11 of the cited decision wherein the Apex Court has observed thus;

> "9. The next contention raise by the learned counsel for the appellant is that the surviving victim,

namely, the daughter of Jagjit Singh may be awarded some compensation under Section 357(3) of the Code of Criminal Procedure. In support of his submission he has also referred to a decision of this court in Rachhpal Singh v. state of Punjab. In the said case, this Court allowed compensation under sub-section (3) of Section 357 CrPC to the victims but it would not be applicable in the present case since a sentence of fine has also been imposed. A reading of sub-section (3) of Section 357 would show that the question of award of compensation would arise where the court imposes a sentence of which fine does not form a part. The decision in Rachhpal Singh does not take any contrary view nor hold that compensation may be awarded over and above the sentence of fine. A perusal of sub-section (3) of Section CrPC would make the position clear.

11. In the present case, sentence of fine has also been imposed, as indicated in the earlier part of this judgment. Out of the fine, a sum of Rs.1000/ each had been ordered to be given to the three injured persons, namely, Dilip Singh, Amarjit Kaur and Gurmeet Kaur. The balance amount is to go to the legal heirs of Jagjit Singh. We had heard the learned counsel for both the parties on this aspect. Learned counsel for the appellant submitted that Gurmeet Kaur lost both her parents as well as her brother in the incident and now she is alone and would have become of marriageable age or may have to start some work of her own. She would need some money. In case she cannot be compensated, the amount of fine may be enhanced to some extent. Learned counsel for the respondent has, however, submitted that out of seven acres of land belonging to his father, the same has been divided into three equal shares and some of it is also under mortgage and he has got two daughters and a son and his wife. He has also submitted that whenever the respondent was released on parole he met Gurmeet Kaur and his wife also keeps on going to meet her. Their relations are normal and cordial. If that is so, nothing better can be thought of in the prevailing circumstances. However, we are not considering for awarding any compensation to Gurmeet Kaur under Section 35(3) CrPC but the amount of fine imposed, can in any case be reasonably enhanced.”

5. The submission of ld. Counsel appearing for the petitioner is not acceptable because it is based on a logic that the powers of the Court under section 357 to award compensation is an ancillary to other sentences including fine and, therefore, it is argued that when the trial Judge has not awarded any amount by way of compensation, the appellate Court ought not to have awarded such compensation. The powers of the appellate Court are very wide and it would be wrong to interprete that the decision awarding compensation to the victim of the crime by the appellate Court would amount to enhancement of punishment imposed by the trial Court. It is true that a sentence can not be enhanced unless the accused has an opportunity of showing cause against such enhancement, but it is very well decided that the powers of the court, obviously therefore of the appellate Court under section 357 of CrPC to award compensation, are not ancillary to other sentence, but is in addition thereto. Here, the court would like to reproduce para-10 of the decision of the Apex Court in the case of **Hari Singh v/s Sukhbir Singh, 1988(4) SCC 551,** where the Apex Court has considered the the scope of section 357 of the Code. Para-10 reads thus:-

" Sub-section (1) of Section 357 provides power to

> award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with Sub-section (1), we are concerned only with Sub-section (3). It is an important provision, but Courts have seldom invoked it, perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of the accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is an addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is in deed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in better way."

6. Of course, the powers of the Apex Court while dealing with the matter are very very wide, but when this Court finds that powers are exercised by the Apex Court in the case of **Baldev Singh & Others v/s State of Punjab, AIR 1996 SC 372**, are exercised awarding compensation to the family of the victim, have been exercised with a view to do the substantive justice to the victim of a crime, it would not be proper to infer that the Apex Court exercised extra-ordinary powers vested in it. In the case of Baldevsingh (supra), the Apex Court was dealing with a criminal appeal filed by a convict of the offence punishable under section 302 respondent/w Sec.34 of Indian Penal Code. The Apex Court, referring the decision

in the case of Harisingh & others (supra) and decision in the case of **Dr. Jecob George v/s State, 1994(3) SCC 430,** has observed thus:-

> " The appellants have served the sentence of imprisonment for more than two years, till they were allowed bail by this Court by order dated 17.11.1987. Balbir Singh is an unfortunate victim. The property disputed between the father and son has led to the unfortunate incident. P.W.5, widow and children of Balbir Singh, are the persons to suffer and they should not be forgotten and by merely maintaining the sentence of imprisonment on the accused, the victim or his heirs are not benefited. Considering the nature of the crime, the fact that the accused and the victim are near relations, that it is a property issue which ended in the calamity, the fact that the accused are admittedly in a position to pay, we are of the view that this is a fit case, in which section 357(3)Cr.PC can be invoked and a just and reasonable compensation given to the family of Balbir Singh."

7. Ms. Brahmbhatt, ld. Counsel appearing for respondent No.2 states that the appellate Court has rightly exercised powers and awarded compensation. She has placed reliance on the decision in the case of Suganthi Suresh Kumar v/s Jagdesshan, , AIR 2002 Page 681, wherein the Apex Court has observed thus:-

> " If a Judicial Magistrate of the First Class were to order compensation to be paid to the complainant from out of the fine realised the complainant will be the loser when the cheque amount exceeded the said limit. In such a case a complainant would get only the maximum amount of rupees five thousand. But the Magistrate in such cases can alieviate the grievance of the complainant by making resort to section 357(3), CrlP.C. The Supreme Court has emphasised the need for making liberal use of that provision. No limit is mentioned in the sub-section and therefore, a Magistrate can award any sum as compensation. Of course, while fixing the quantum of

> such compensation, the Magistrate has to consider what would be the reasonable amount of compensation payable to the complainant. Thus, even if the trial was before a court of a Magistrate of th first class in respect of a cheque which covers an amount of Rs.5000/- the Court has power to award compensation to be paid to the complainant."

8. The Court is aware that in the present case, the conviction is for the offence punishable under section 138 of N.I.Act. In the background of one undisputed fact that country is heading towards globalisation and inter-city or inter-State business at a large scale, a business or trading activity of a small trader or businessman may get paralysed in the event of bouncing of a cheque or two or in all such cases, the trial Court should always think of awarding compensation to be received by the complainant in exercise of the powers vested in the Court under section 357 of CrPC. If the trial Court fails in awarding the compensation, then while upholding the conviction and sentence, the appellate Court should apply its mind in this direction. The Court, in such a situation, should even assign reasons why adequate compensation is not awarded to the victim. Only then the purpose and object of introduction of Chapter-17 of the Act would be served substantially. The basic argument of ld. Counsel appearing for the petitioner on this point, are found contrary to the concept and object of section 357 of CrPC and the Scheme of Sec.374 respondent/w

Sec.386 of CrPC and scheme of Chapter-17 of the NI Act. So, it would not be proper for this Court to admit the Revision Application and entertain the same for the same of admitting it and the same requires to be dismissed.

9. For short, the Court is not impressed with the arguments advanced by ld. Counsel appearing for the petitioner and ratio of the decisions referred to above, would not help the petitioner as the same would not apply to this case considering the facts of the present case.

10. In view of above, there is no merits in the present Cri. Rev. Application and the same is hereby dismissed. Both the orders under challenge are hereby confirmed. Notice discharged. I.R. granted earlier stands vacated . However, the petitioner accused is granted time to surrender before the ld. JMFC concerned for undergoing imprisonment imposed on him by the trial Court and confirmed by the ld. Addl. Sessions Judge within 15 (fifteen) days from today, failing which, the trial Court shall issue Non-Bailable Warrant for execution of the order of conviction and sentence as well as fine imposed.

(C.K. BUCH, J)

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